Supreme Court of the United States

OCTOBER TERM, 1949

NO. 173

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*,

vs.

UNITED STATES SMELTING REFINING AND MINING COMPANY, AMERICAN SMELTING & REFINING COMPANY, THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF FOR PUBLIC SERVICE COMMISSION OF UTAH AND STATE OF UTAH

CLINTON D. VERNON,
Attorney for the State of Utah

CHARLES A. ROOT,
Attorney for the Public Service Commission of Utah

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OPINIONS BELOW

Neither the findings of fact and conclusions of law (R. 449-463) nor the opinion (R. 474-477) of the District Court have been reported. The District Court opinion refers to, in part incorporates, and in part is based upon a previous opinion (R. 299-302) in a predecessor case also unreported. The decree of the District Court permanently enjoins an order of the Interstate Commerce Commission reported at 270 I.C.C. 385 (R. 315-321) (and one at 270 I.C.C. 359 (R. 364-375)). The previous decision of the District Court reviewed an order of the Interstate Commerce Commission reported at 266 I.C.C. 476 (R. 271-279) and 263 I.C.C. 749 (R. 330-341) (and those at 266 I.C.C. 349 (R. 29-52) and 263 I.C.C. 719 (R. 55-85)).

JURISDICTION

A final decree permanently enjoining the order of appellant Inter-state Commerce Commission (defendant below) was entered by the District Court of the United States for the District of Utah (sitting as a three-judge statutory court) on January 10, 1949 (R. 463-464). Appeals by the Interstate Commerce Commission and the United States were allowed by the District Court on March 7, 1949 (R. 465). Probable jurisdiction was noted on October 10, 1949. Jurisdiction of the appeals is based upon the provisions of the Judicial Code as amended by the Act of June 25, 1948, 28 U.S.C. Sections 1253, 2101 (b).

INTRODUCTORY STATEMENT

The State of Utah, by its Attorney General, and the Public Service Commission of Utah, by its Commerce Attorney, were allowed to intervene in these consolidated causes in the United States District Court pursuant to Section 45a, Title 28, U.S.C.A. (now Section 223 of new Title 28, U.S.C.A.). The trial court made its orders permitting the State of Utah and the Public Service Commission of Utah to intervene in the Trial of the consolidated causes (R. 297, 444, 445).

SUMMARY OF ARGUMENT

The Public Service Commission of Utah has jurisdiction of the regulation of intrastate commerce. It and the State of Utah are interested in this case because of their interest in the economic welfare of the railroads, the non-ferrous metal mining industry and smelting interests of Utah and because of the effect on intrastate commerce and the intrastate tariffs and practices.

We agree with the smelters and the carriers that the present tariff rates compensate for all services rendered, and the effect of the order of the Interstate Commerce Commission, enjoined by the District Court, is to require the railroads to charge twice for the same service. We also agree that what has been designated by the Commission as

switching service is part of the line-haul under Ex Parte 104, Part II, and is not switching service. But in addition to these matters, which should be conclusive in this case, there are other reasons for not interfering with the present arrangement at the smelters even though there were no double charge and even though the end of line-haul does terminate at the points found by the Interstate Commerce Commission. *Long established practices of the carriers and industries should not be disturbed without definite and sufficient reasons.* Furthermore, the so-called switching service is included in the sampling in transit tariff, and there should, therefore, be no additional charge for so-called switching involved in the sampling of ore.

Should there be a separate tariff for switching on the basis of a freight charge per car, the rate structure which is based upon values will be destroyed so far as this part of the service is concerned.

The Interstate Commerce Commission has based its orders upon a finding that the performance of the described services within the plant without reasonably compensatory charges in addition to the line-haul rates results in the smelting companies receiving a preferential service not accorded shippers generally (Finding No. 9 (R. 320-321, 375)). There is no evidence to support a finding of such preference, and in any event a preference is not unlawful unless it results in an undue prejudice or disadvantage to another person, locality, commodity, or class of traffic which has not been shown. See *Nashville Railway Company vs. Tennessee*, 262 U. S. 318.

ARGUMENT

I.

LONG ESTABLISHED PRACTICES SHOULD NOT BE DISTURBED WITHOUT DEFINITE AND SUFFICIENT REASONS.

The State of Utah and the Public Service Commission of Utah are both particularly interested in the economic

welfare of the railroads, and the non-ferrous mining and smelting interests of Utah and the intermountain west. The Public Service Commission of Utah is also interested because of the effect of the orders on intrastate practices and tariffs. It is respectfully submitted that any systems or methods worked out by the experience of fifty years so as to subserve the best interests of all parties should not be upset or overthrown without a full understanding and realization of the economic consequences of such an act.

In the first place, it is important to know that the mining, transportation, and smelting of non-ferrous ores in Utah are carried on under the terms of railroad tariffs that apply alike to interstate and intrastate commerce. No one in Utah obtains any different or better advantages under the tariffs insofar as the litigated provisions are concerned, although the tonnage is about 90 percent intrastate in character (R. 335,615).

In addition to this we think the Court can take judicial notice of the fact that ordinarily Utah smelters produce nearly one-third of all the copper produced in the United States. For example, during World War No. II, Utah produced in 1943, 647,978,000 pounds of copper, while the entire production in the U.S. was 2,181,636,000 pounds, and every pound of Utah copper moving by common carriers was mined, shipped, and smelted *under the very provision of the tariffs that the Interstate Commerce Commission has condemned as unlawful.*

There must be some compelling reason why these railroads, the smelters and the miners, mine owners and their association resist to the utmost the order of the Interstate Commerce Commission declaring the practices of the carriers herein to be unlawful. It would appear to us that if these practices were unlawful or harmful some of the appellees would "rise up and complain". The fact that none of these appellees have previously complained about the practices which the Commission now condemns as unlawful, appears to negative the idea that the practices are unlawful and harmful.

II.

THE SO-CALLED SWITCHING SERVICE IS INCLUDED IN THE SAMPLING IN TRANSIT TARIFF.

One important point appears to be the desire of the Interstate Commerce Commission that the rates for line-haul service of the ores from the mines to the smelter should not also include compensation for the intermediate switching at the samplers. A "sampler" is a plant usually maintained and operated by the Smelter for the purpose of taking "samples" of the ore in each car for the purpose of not only ascertaining the value of the ore, but also for determining which smelter, i.e., a copper smelter, or lead smelter or other type of smelter can best smelt the car to get the biggest return from its ore. (R. 275-276) There is also an independent sampler in Utah and this sampler is given transit rates and services identical with those of the smelting companies involved herein. We think the necessity of having the switching at the samplers included in the line-haul rates justifies an explanation of the facts. In the first place, The Almighty has placed these non-ferrous ores at various points and places throughout the western mountain states. These deposits vary greatly in richness, in composition, and in volume. A prospector locates what to him appears to be a copper mine. Upon development this mine produces ores of varying richness in copper. In addition there may also be lead, or zinc, or silver, or gold in varying amounts to such a degree that no two carloads of ore from this mine are alike or any where near alike. Some may be poor, some medium, some rich in mineral content. These circumstances make it necessary to *sample each and every car* at the "sampler".

The sampling in transit tariff (R. 263) permits the sampling as in transit service, and the service is included under the tariff. This practice is not disapproved where, after sampling, the ore is sent to another smelter (R. 276). The order of the Commission requiring an additional tariff for all services beyond the assembly yard nullifies the sampling in transit tariff, which tariff has in no way been disapproved or considered invalid.

III.

A SEPARATE CHARGE FOR SWITCHING ON A FREIGHT RATE PER CAR DESTROYS THE ELEMENT OF VALUE IN FIXING THE FREIGHT RATE.

The railroads for many years have published their rate for transportation of non-ferrous ores on the basis of the value of the mineral in the ore. On low value ores the rates for line-haul and so-called switching (combined) are relatively low. *These rates progressively increase as the value of the ores increase.* This plan makes it possible for the mine owner to ship his poor ores at low rates and his good ores at progressively higher rates. And the freight rate includes the *total charge* for line-haul and switching. The railroad is satisfied because in the aggregate its revenues for the total services are sufficient and adequate. The smelters are satisfied because they have provided the "samplers" and, except for switching, they operate the samplers and furnish to the railroad and the miner its certificate of the value of each carload, upon receipt of which the railroad makes out its freight bill and the smelter settles its bill with the miner or mine owner, less the freight paid. There are, of course, many ramifications of this system but in essence they all embody the same idea, i.e., the compensation for line-haul and for so-called switching are covered by one freight bill based upon the value of the ore in each car.

Assuming that the Commission's order requires the carrier to render a separate charge for line-haul and for switching (the order in fact requiring an additional charge for so-called switching), the switching charge would necessarily be on a per car basis, that is, a fixed charge for each car. Thus the low grade ores would pay the same price for so-called switching as the high grade ores. This would destroy in part the present system of tariffs under which freight charges are graduated according to the value of ore shipped.

Utah also has large deposits of iron ore and furnaces and mills to use this ore. No such plan as that now in

effect for non-ferrous ores is used in transporting iron ore, because primarily *there is no demand for such a plan.*

It is our contention and position that the railroad being a *public utility* or *servant* should provide services and systems of charges as *demanded and needed* by the different types of commerce and industry. Ordinarily they are permitted and required to do that very thing. Why should they be *forced* to refuse the non-ferrous mining industry, a really essential service, and system of rates which this very investigation discloses has been in effect for approximately fifty years without change or challenge.

Indeed, if it is proper and lawful to provide by tariff the line-haul rates according to the value of the shipment transported, why is it not *legal to also provide for switching charges on the same basis?* And if that is legal why separate these charges at all?

IV.

THE FINDING OF THE COMMISSION THAT THE PRESENT PRACTICE RESULTS IN A PREFERENTIAL SERVICE TO THE INDUSTRIES IS UNSUPPORTED BY EVIDENCE. (SEE FINDINGS NUMBERED 9 BY THE COMMISSION IN EACH CASE (R. 320, 375)).

We submit that there is no evidence in the record from which finding No. 9 in these cases can be sustained and suggest that the Interstate Commerce Commission point to such evidence if there be any in the record.

There is nothing in the competitive situation which calls for a change in the present practices regarding carrier service at the smelters. There are comparatively few smelters in this or any other area, and they are generally of comparative size and require substantially the same carrier service. There are no small competitive industries to be eliminated or to be burdened by reason of a preference. Even when a preference exists, it is not necessarily unreasonable, undue or unjust if it does not in fact result in any prejudice or disadvantage to any other person, locality, commodity, or class of traffic. As stated by this Court in

the case of *Nashville Railway Company vs. Tennessee*, 262 U. S. 318:

> "Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by §§ 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co. vs. Interstate Commerce Commission*, 162 U.S. 197, 219, 220; *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 481. Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic." *Nashville Railway v. Tennessee*, 262 U.S. 318.

V.

CONCLUSION

Inasmuch as the mining industry has demonstrated to the railroads the absolute necessity of maintaining the present provisions of the tariff for the full and free development of the non-ferrous mines in this State and surrounding states, we humbly submit that to order these provisions to be changed would deprive the railroads of much needed revenues and cripple the smelting companies and miners and mine owners by making it impossible to ship large quantities of their low grade ores.

We have read and considered the briefs of the other Appellees and we consider them well taken. We will, however, leave to those parties the particular defenses necessary in each case. Our only endeavor here is to pursuade the Court that the copper and non-ferrous mining industry is entirely unique in the particular that the ores mined, treated, and transported are entirely different from any other ores in the world because these non-ferrous ores are mixed one with the other in varying amounts also in varying degrees of richness or value, making each car thereof carry a different value.

Respectfully submitted,

Clinton D. Vernon, Attorney for the State of Utah

State Capitol

Salt Lake City, Utah

Charles A. Root, Attorney for Public Service Commission of Utah

State Capitol

Salt Lake City, Utah

Dated at Salt Lake City, Utah,
this 2nd day of February, 1950.